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No. 06-6407

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IN THE

Supreme Court of the United States

SCOTT LEWIS PANETTI,

Petitioner,

v.

NATHANIEL QUARTERMAN,
Director, Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF AMICI CURIAE OF LEGAL HISTORIANS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are legal historians who cumulatively have more than one hundred years of experience writing, studying, and teaching legal history, including the common law of England and the laws and practices of framing-era America. Though we submit this brief in support of Mr. Panetti, our principal interest is to assist the Court in placing this case in the proper historical context. We believe the standard articulated by the Fifth Circuit governing mental competency for execution strayed from the common law approach that defines the minimum Eighth Amendment protections. In our view, executing a mentally ill defendant, such as Mr. Panetti, would have been "cruel and unusual" punishment in England during the eighteenth century as well as in the United States at the adoption of the Bill of Rights.

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[1] No counsel for a party authored this brief in whole or in part. No person or entity made a monetary contribution to the preparation or submission of this brief. All parties consent to the filing of this brief, and their letters of consent are on file with the Clerk of the Court.

on the history of criminal law, and his scholarly writings include *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200-1800* (1985) and *Freedom and Criminal Responsibility in the Age of Pound: An Essay on Criminal Justice*, 93 Mich. L. Rev. 1915 (1995). He is editor of *Studies in Legal History*, sponsored by the American Society for Legal History, and co-editor of *On the Laws and Customs of England: Essays in Honor of Samuel E. Thorne* (1981) and *Twelve Good Men and True: The Criminal Trial Jury, 1200-1800* (1988).

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SUMMARY OF THE ARGUMENT

1. This Court has held that the Eighth Amendment ban on "cruel and unusual punishment embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted." *Ford v. Wainwright*, 477 U.S. 399, 405 (1986); *accord Solem v. Helm*, 463 U.S. 277, 286 (1983); *Weems v. United States*, 217 U.S. 349, 375 (1910). At the time the Bill of Rights was adopted, the common law treated execution of the mentally ill as cruel and unusual. Indeed, the English jurists who most influenced

the Founders, such as Blackstone, had denounced departures from this rule as "miserable spectacles" and "inconsistent with Humanity." Based on the historical record, the Court in *Ford* recognized that the Eighth Amendment incorporates the common law ban on executing the mentally ill.

2. The question posed in this case thus is not whether the Eighth Amendment bans execution of mentally ill defendants, but rather which defendants fall within this proscription. History reveals no precise definitions or uniform standards used at common law to determine mental competency. But it is clear what the common law did not do. It did not draw the minute distinctions the Court of Appeals demarcated below. It did not differentiate, as that Court did, between those who understood *that* they were to be executed and those who understood *why*. And it did not dissect a defendant's delusions for some tenuous link to reality permitting execution. Psychiatry, with its refined diagnostics, had yet to be born. The assessment of a defendant's fitness to be tried, convicted, or executed was broad-gauged, based on an estimation of his generalized "understanding." Reports of criminal trials suggest that courts did not engage in any systematic inquiry, but observed the behavior of the defendants. And post-verdict assessments, which appear to have more readily treated defendants as mentally ill than the assessments at trial, likewise focused on the commonly recognized and conspicuous manifestations of insanity.

Jurists and commentators also took a broad-brushed approach. To the extent they parsed the nuances of mental illness, they considered a defendant incompetent for execution if he possessed the reasoning ability of child of less than fourteen. That standard, too, is not consistent with the Court of Appeals' approach, as a child could likely have appreciated the fact of execution, even if not the reason for it.

3. If clarity as to day-to-day application of the common law ban is elusive across the span of time, it is not so as to the contemporaneous rationales for the ban. The common law was

pragmatic. The scope and application of its rules reflected their purposes. Examination of those purposes confirms that the common law, as understood at the time the Bill of Rights was adopted, would not have allowed execution of individuals based on the narrow standard adopted below.

A principal justification for the common law rule was that executing the insane did not serve the retributive purpose of the death penalty. Executions in the seventeenth and eighteenth centuries were public events, with sermons and often a penitent statement by the condemned defendant. A defendant who lacked understanding of why he was being punished, who, for example, suffered from the delusion that he was being executed "to punish him for preaching the Gospel," *Panetti v. Dretke*, 448 F.3d 815, 818 (5th Cir. 2006), would not have been a suitable participant in that morality play. More generally, as recognized then and now, retribution rings hollow when a defendant's dementia prevents him from understanding why he is being punished. As Justice Powell stated in his pivotal concurring opinion in *Ford*, the retributive function of the death penalty precludes execution of those "who are unaware of the punishment they are about to suffer and why they are to suffer it." 477 U.S. at 422 (Powell, J., concurring).

In addition, the common law rule reflected the judgment that executing the insane did not serve the interests of deterrence. Deterrence, it was thought, required that the public identify with the condemned prisoner, that they perceive he was like them, and therefore that they could receive similar punishment for criminal acts. The more bizarre the defendant's behavior, the less the public could identify with him, or so it was believed. It is doubtful they could have seen themselves in the shoes of a defendant so delusional that he could not apprehend the reason for his execution. *See* 1 Nigel Walker, *Crime and Insanity in England* 197 (1968).

Another purpose of the common law ban on executing the mentally ill was that the incompetent could not offer reasons

why the Crown or the court should grant clemency. That would be true of a defendant who did not understand why he was being executed. On this rationale, too, the Court of Appeals' standard is inconsistent with the common law.

It was also considered cruel to execute the insane because they could not repent and seek divine forgiveness, consigning them to eternal damnation. This rationale as well would extend the common law ban to defendants like Mr. Panetti. One who did not appreciate the reasons for his punishment could not confess and repent.

In sum, the evidence regarding the application of the common law ban against executing the mentally ill, the jurists' and commentators' explication of it, and the articulated bases for it are at odds with the Court of Appeals' approach. The common law would not have permitted execution of a mentally ill defendant suffering from conspiratorial delusions regarding the reasons for his sentence. Because the Eighth Amendment, at the very least, bars those punishments considered cruel and unusual at the time of its adoption, it incorporates this broad ban. It therefore does not permit execution of Mr. Panetti.

ARGUMENT

I. THE EIGHTH AMENDMENT, AT A MINIMUM, BANS THOSE PUNISHMENTS THAT WERE PROHIBITED AT COMMON LAW.

As this Court has recognized, "[t]he Eighth Amendment was based directly on Art. I, § 9 of the Virginia Declaration of Rights (1776), authored by George Mason." *Solem v. Helm*, 463 U.S. 277, 286 n.10 (1983) (citing A. Nevins, *The American States During and After the Revolution* 146 (1924) and A. Howard, *The Road from Runnymede: Magna Carta and Constitutionalism in America* 205-07 (1968)). Mason, in turn, had "adopted verbatim the language of the English Bill of Rights." *Id.* That original ban on "cruel and unusual punishment" embodied the safeguards that the common law afforded English

subjects. *See* 1 Joseph Chitty, *A Practical Treatise on the Criminal Law* (5th Am. ed. 1847 (from 2d London ed.)) (cruel and unusual punishment ban forbids courts from inflicting any punishment "which did not exist at common law"). As the Court has explained, the English Bill of Rights' "requirement that punishment not be 'unusuall' – that is, not contrary to 'usage' (Lat. "usus") or 'precedent' – was primarily a requirement that judges pronouncing sentence remain within the bounds of common law tradition." *Harmelin v. Michigan*, 501 U.S. 957, 974 (1991).

In incorporating this language into the Eighth Amendment, the Framers thus understood that they were guaranteeing at least those protections from punishment the common law afforded English subjects. For instance, Mason, the principal Framer of the Amendment, argued that Americans ought to have the "Liberties & Privileges of Englishmen, in the same Degree, as if we had still continued among our Brethren in Great Britain . . . . We have received [these rights] from our Ancestors, and, with God's Leave, we will transmit them, unimpaired to our Posterity.'" *Solem*, 463 U.S. at 286 n.10 (quoting Letter to "the Committee of Merchants in London" (June 6, 1766), *reprinted in* 1 The Papers of George Mason 71 (Rutland ed. 1970)). *See also* Fairfax County Resolves (1774), *reprinted in* 1 The Papers of George Mason at 201 (colonists entitled to all "Privileges, Immunities and Advantages" of the English Constitution).

Indeed, during Virginia's ratifying convention in 1788, Patrick Henry argued that Virginians should not approve the new Constitution absent a prohibition against cruel and unusual punishment like that contained in the Virginia Declaration of Rights. *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* § 14.2.2.2a (Neil H. Cogan ed., 1997) (June 14, 1788 Virginia State Convention, Statement of Mr. Henry). The ban on "cruel and unusual punishment," he argued, would ensure that common law would prevail over contrary practices from France, Spain and Germany. *Id. See also* 1 J. Cont'l Cong. 83 (Ford ed., 1904) (Address to the People of

Great Britain, Oct. 21, 1774 ("[W]e claim all the benefits secured to the subject by the English constitution.")).

To be sure, Members of the Court have differed on whether "any punishment that was in common use in 1791 is forever exempt" from the limitations of the Eighth Amendment, *Furman v. Georgia*, 408 U.S. 238, 284 n.29 (1972), and whether the Court appropriately focuses on "evolving standards of decency" in setting the outer boundaries of Amendment, *see Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958)). But there has been little disagreement on the Constitutional floor: the ban on "cruel and unusual punishment embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted." *Ford*, 477 U.S. at 405; *accord Solem*, 463 U.S. at 286 ("Although the Framers may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection – including the right to be free from excessive punishments."); *Weems v. United States*, 217 U.S. 349, 375 (1910) ("We may rely on the conditions which existed when the Constitution was adopted."); *accord Atkins*, 536 U.S. at 339 (Scalia, J., dissenting) (a punishment is banned by the Eighth Amendment if it is among "those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted" (quoting *Ford*, 477 U.S. at 405)).

In *Ford*, a majority of the Court found that because common law barred execution of the insane, the Eighth Amendment can do no less. *Ford*, 477 U.S. at 417-18. The Court in *Ford* provided no precise definition of mental illness sufficient to evoke the ban, nor did it need to plumb the historical record to discern the scope of the ban under common law. But the Court's analysis of the common law was sufficient for a majority to conclude correctly that it would not allow the execution of a person who

could not properly appreciate the connection between his crime and his punishment. *Id.*

In depth analysis of the historical record confirms this conclusion. The common law did not employ the narrow approach adopted by the Fifth Circuit below, and it would not have permitted the execution of Mr. Panetti.

II. UNDER THE COMMON LAW, MENTALLY ILL DEFENDANTS SUCH AS MR. PANETTI WERE SPARED EXECUTION.

A. The Common Law Banned Execution of Mentally Ill Defendants as Cruel and Inhumane.

Few question that the common law as understood by the Framers banned executions of the insane. As this Court has recognized, "two of the greatest English jurists, Lord Chief Justice Hale and Sir William Blackstone . . . exerted considerable influence on the Founders,"[2] and each recognized the ban. Writing in the seventeenth century, Hale was unequivocal:

> If a man in his sound memory commits a capital offence, and before his arraignment he becomes absolutely mad, he ought not by law to be arraigned during such his phrenzy, but be remitted to prison until that incapacity be removed . . . . [I]f such person after his plea, and before his trial, become of *non sane memory*, he shall not be tried; or, if after his trial he become of *non sane memory*, he shall not receive judgment; or, if after judgment he become of *non sane memory*, his execution shall be spared . . . .

1 Matthew Hale, *The History of the Pleas of the Crown* 34-35 (1736).

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[2] *Reid v. Covert*, 354 U.S. 1, 26 (1957).

Over a century later, Blackstone echoed the prohibition, calling the execution of the insane "of extreme inhumanity and cruelty":

> [I]f a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it . . . . And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defence? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed.

4 William Blackstone, *Commentaries on the Laws of England* 24-25 (1st English ed. 1769) (citing Edward Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown, and Criminal Causes* 6 (1797)).[3] Thus, even if a defendant was found competent to stand trial and found guilty of a capital crime, the judge was required to grant a "reprieve" if he found that defendant to be of "nonsane memory" before execution. As Blackstone explained, a reprieve was "the withdrawing of a sentence for an interval of time; whereby the execution is suspended." 4 Blackstone, *supra* at 387. Before execution, the judge was supposed to "demand of the prisoner what he hath to allege, why execution should not be awarded against him." *Id.* at 389. It was an "invariable rule" that if the convicted person "appears to be insane, the judge in his discretion may and ought to reprieve him." *Id.* Blackstone provided an example of such a reprieve, the 1723 case of Edward Arnold, who was found competent to stand trial and convicted "for shooting at lord Onslow" but "being half a madman, was never executed, but confined in

[3] This first English edition of Blackstone's Commentaries, published in 1769, is the same as the first American edition, published in Philadelphia in 1772. Eldon Revare James, *A List of Legal Treatises Printed in the British Colonies and the American States Before 1801* 16-17 (1934).

prison, where he died about thirty years after." *Id.* at 208; *see also* John H. Langbein, *The Origins of Adversary Criminal Trial* 173-74 (2003).

Hale and Blackstone were not alone in recognizing the common law rule against executing the mentally ill. Hawles, citing Coke, wrote that "nothing is more certain Law, than that a Person who falls mad . . . after Judgment, . . . shall not be executed." John Hawles, *Remarks on the Trial of Charles Bateman, in* 4 *A Complete Collection of State-Trials and Proceedings for High-Treason and Other Crimes and Misdemeanours*, 203-06 (4th ed. 1777). Hawkins, too, reported that a defendant who became *non compos mentis* "after Conviction . . . shall not be executed." 1 William Hawkins, *A Treatise of the Pleas of the Crown* 2 (1716). Eighteenth century legal works, published in England and the states, also discussed this proscription.[4]

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[4] 2 William Nelson, *An Abridgment of the Common Law: Being a Collection of the Principal Cases Argued and Adjudged in the Several Courts of Westminster Hall* 1141 (1726) ("[A] Man *Non compos mentis* . . . shall not lose his Life, tho' he killeth a Man."); Rev. Dr. John Trusler, *A Concise View of the Common and Statute Law of England* 261 (1781) ("If a man in sound mind commits a capital offence, and before arraignment loses his senses, he shall not be arraigned; because not able to plead in his own behalf; nay, if he becomes mad after he is found guilty, and condemned, execution shall be stayed."); 3 Matthew Bacon, *A New Abridgment of the Law, by a Gentleman of the Middle Temple* 86 (1740) ("[I]f one who has committed a Capital Offence become *Non compos* before Conviction, he shall not be arraigned; and if after Conviction, he shall not be executed."); Richard Joseph Sullivan, *Thoughts on Martial Law, and on the Proceedings of General Courts Martial* 32 (1779) ("[A] person, who has committed a capital crime, if he becomes *non compos* before conviction [should not] be arraigned, nor, if after conviction to be executed."); 2 Timothy Cunningham, *A New and Complete Law-Dictionary* (2d ed. 1771) at "Ideots and Lunaticks" ("[I]f one who is committed for a capital offence become *non compos* before conviction, he shall not be arraigned; and if after

(Cont'd)

So deeply rooted was the ban on executing the insane that departures evoked controversy and criticism in eighteenth century England. An oft-cited object of attack was a sixteenth century statute that permitted executions of insane persons convicted of treason:

> [I]n the bloody reign of Henry the eighth, a statute was made, which enacted, that if a person, being *compos mentis*, should commit high treason, and after fall into madness, he might be tried in his absence, and should suffer death, as if he were of perfect memory.

4 Blackstone, *supra*, at 25. The commentators described this law as "savage and inhuman," and it was repealed as a "miserable spectacle, both against law, and of extreme inhumanity and cruelty, and [which] can be no example to others." *Id.* (citing Edward Coke); *accord* 1 Hale, *supra*, at 34-35; 1 Hawkins, *supra*, at 2.

Another departure from the ban, the trial and execution of Charles Bateman in 1685, prompted similar criticism. During his trial, Bateman "seemed to be distracted, and therefore, out of abundance of Charity, the Court appointed his Son to make his Defence for him." Hawles, *supra*, at 203, 205-06. Despite clear signs of mental illness, he was tried and executed. Citing Coke, Hawles attacked that result as offensive to the common law:

> But the Court by excusing their Favour upon that account, incurred a worse Censure; for nothing is more certain Law, than that a Person who falls mad after a Crime suppos'd to be committed, shall not

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conviction, he shall not be executed."); Giles Jacob, *A Law Grammar; or Rudiments of the Law* 15 (4th ed. 1767) ("[I]f a Traytor becomes *non Compos* before Conviction, he may not be arraigned, and if after, shall not be executed").

> be try'd for it; and if he falls mad after Judgment, he shall not be executed . . . .
>
> [T]he Law, as to this matter, when this Man was tried and executed, was as it was at common Law; and therefore if he was of *non sana Memoria*, he ought not to have been try'd, much less executed.

Id. at 205-06. Deviations such as the treason statute and the execution of Bateman made an impression on English jurists and lawmakers, which carried over to the Framers. Both before and after Independence, the ban on executing mentally ill defendants was reflected in the principal legal resources available to the Framers, including Blackstone's Commentaries,[5] colonial and post-Independence justice of the peace manuals,[6]

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[5] *E.g.*, Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. Pa. L. Rev. 1, 5 (1996) ("One thousand copies of the English edition of Blackstone were sold in the American Colonies before the first American edition appeared in 1772. This edition supplied another 1400 sets at a substantially lower price; and one year before the Declaration of Independence, Edmund Burke remarked in Parliament that nearly as many copies of the Commentaries had been sold on the American as on the English side of the Atlantic." (footnotes omitted)). As some commentators have recognized, "[a]ll of our formative documents – the Declaration of Independence, the Constitution, the Federalist Papers, and the seminal decisions of the Supreme Court under John Marshall – were drafted by attorneys steeped in [Blackstone's Commentaries]." *Id* at 2 (citation and quotation marks omitted).

[6] Citing Hale and Hawkins, various editions of an influential English justice of the peace manual recited the common law rule that "[i]f one who hath committed a capital offence become *non compos* before conviction, he shall not be arraigned; and if after conviction, he shall not be executed." *E.g.*, 2 Richard Burn, *The Justice of the Peace, and Parish Officer* 129 (1755) ("If one who hath committed a capital offence become *non compos* before conviction, he shall not be arraigned; and if after conviction, he shall not be executed."); 3 Richard Burn & John Burn, *The Justice of the Peace and Parish Officer* 116 (18th ed. 1797) (same). Colonial justice of the peace manuals, often based on

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and law dictionaries, originally published in England and later reprinted in the states.[7] Ultimately, it was incorporated into the Eighth Amendment.

B. In Determining Whether a Defendant Was Mentally Ill, the Common Law Did Not Draw the Fine Lines Delineated by the Court Below.

As noted, the common law contemplated that a defendant could be spared from execution as mentally ill, even though he previously was found competent to stand trial and criminally responsible for his actions. It follows, then, that either the standards were more lenient for determining whether the

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Burn's manuals, reflected the ban on executing the insane. *See* Richard Burn, *An Abridgment of Burn's Justice of the Peace and Parish Officer* 261 (1773) (Boston) ("If one who hath committed a capital offence become *non compos* before conviction, he shall not be arraigned; and if after conviction, he shall not be executed."); Richard Starke, *The Office and Authority of a Justice of Peace* 243 (1774) (Virginia) ("If One who hath committed a capital Offence become *non compos* before Conviction, he shall not be arraigned; and if after Conviction, he shall not be executed."). Post-independence manuals similarly reflected the ban. James Parker, *Conductor Generalis* 291 (1788) (New York) ("If one who hath committed a capital offence become *non compos* before conviction, he shall not be arraigned; and if after conviction, he shall not be executed."); *The South-Carolina Justice of Peace* 329 (John F. Grimke ed., 1788) ("If one who hath committed a capital offence become *non compos* before conviction, he shall not be arraigned; and if after conviction, he shall not be executed."); William Waller Hening, *The New Virginia Justice* 310 (1795) ("If one who hath committed a capital offence become *non compos* before conviction, he shall not be arraigned; and if after conviction, he shall not be executed.").

[7] 2 Giles Jacob, *The Law Dictionary: Explaining the Rise, Progress, and Present State, of the English Law* 500 (T.E. Tomlins ed., 1811) (first American edition of Jacob's Law dictionary) (citing Hale for ban on executing those who are *non compos*); *accord* 3 Giles Jacob, *The Law Dictionary: Explaining the Rise, Progress, and Present State, of the English Law* 382 (T.E. Tomlins, ed., 1811).

defendant was fit to be executed, or the law contemplated the prospect of deterioration in the defendant's mental condition between judgment and execution.

A number of factors suggest that the standards for fitness to be executed were more lenient to the defendant than the standards at trial for mental illness precluding criminal responsibility. First, the time between conviction and execution was quite short, often two weeks. Stuart Banner, *The Death Penalty: An American History* 17 (2002). Although it is possible that a defendant's mental state could deteriorate during that period, it would seem not so common an occurrence as to engender the extensive treatment in the commentaries of executing the mentally ill. Second, the determination whether to assess the defendant's mental state for purposes of staying the execution after conviction was addressed to the discretion of the Court or the Crown.[8] Third, a reprieve could be temporary, postponing execution until the defendant regained his sanity. By contrast, the stakes were higher at trial, where an acquittal based on insanity was a resolution of the defendant's criminal responsibility. Finally, commentary on the common law available at the time of the Framing and before supports the notion that the bar to executing the mentally ill required a lesser

[8] Any discretion to assess the defendant's mental state should be distinguished from discretion to grant the reprieve. Hale indicates that whether to investigate the sanity of a defendant is a left to a court's discretion. He noted, however, that "because there may be great fraud" in matters relating to the mental illness of a defendant, the judge "may do well" to impanel a jury to inquire *ex officio* of the defendant's alleged mental illness and that "it is prudence" to do so. 1 Hale, *supra*, at 35. Once the court or King determined the defendant insane, there was no discretion, and the execution had to be stayed. Specifically, Hale explained that there were three kinds of reprieves. First, *ex mandoato regis* (at king's command) was discretionary. Second, *ex arbitrio judicis* (at the judge's discretion) likewise was discretionary. Third, *ex necessitate legis* (out of necessity of law) was mandatory. 2 Hale, *supra*, at 412-13. The stay due to insanity fell within the third, mandatory category. *See* 4 Blackstone, *supra*, at 387-89; 1 Walker, *Crime*, *supra*, at 196.

showing of impairment than at earlier stages of the proceedings. For instance, Blackstone attributes the forbearance from executing Arnold for shooting at Lord Onslow to Arnold's "being *half* a madman," after a jury rejected Arnold's insanity defense and found him guilty, and after he was sentenced to death, 4 Blackstone, *supra*, at 208 (emphasis supplied); 1 Walker, *Crime*, *supra*, at 55-57. Hawles, too, suggested that the competency standard for execution had a lower threshold than for trial. In decrying the execution of Charles Bateman, Hawles noted twice that, if Bateman was mentally ill, he "ought not to have been try'd, *much less executed*," Hawles, *supra*, at 205-06 (emphasis supplied), suggesting that Hawles believed it was a greater infraction of the law to execute an insane person than to try him in the first place.

The question, therefore, is not whether a defendant like Mr. Panetti would have been acquitted on the basis of insanity at common law, but whether he would have met a less exacting standard precluding his execution. That said, divining the tests for insanity applied at any of these stages of judicial proceedings more than 200 years ago is difficult, to say the least. Clearly, though, at the time of the framing and before, courts did not have the sophisticated and intricate diagnostic tools and categories developed by modern psychiatry. Joel Peter Eigen, *Witnessing Insanity: Madness and Mad-Doctors in the English Court* 58 (1995). The common law appears to have painted insanity with a broad brush, undertaking an assessment of the manifestly delusional or irrational actions of a defendant. That is not consistent with the hairsplitting of the Fifth Circuit, which treated a defendant as sane if he understands *that* he is to be executed, regardless of whether he understands *why*.

To begin with, the contemporaneous commentaries on the common law do not support the distinction drawn by the Fifth Circuit as a test for insanity at any stage of the proceedings. Hale provided the most elaborate categorization of the types of insanity under the common law. 1 Hale, *supra*, at 29-37. He considered insanity a "defect of the understanding." *Id.* at 15.

See also 1 George Dale Collinson, *A Treatise on the Law Concerning Idiots, Lunatics, and Other Persons Non Compotes Mentis* 473 (1812) (equating "defect in the understanding" with "dispossession of the free and natural agency of the human mind"); Nigel Walker, *The Insanity Defense Before 1800*, 477 Annals Am. Acad. Pol. & Soc. Sci. 25, 28 (1985). Hale's influential treatise focused primarily on the mental state necessary for conviction. In that regard, he drew a distinction between total and partial insanity, noting:

> [S]ome persons, that have a competent use of reason in respect of some subjects, are yet under a particular *dementia* in respect of some particular discourses, subjects or applications; or else it is partial in respect of degrees; and this is the condition of very many, especially melancholy persons, who for the most part discover their defect in excessive fears and griefs, and yet are not wholly destitute of the use of reason; and this partial insanity seems not to excuse them in the committing of any offence for its matter capital; for doubtless most persons, that are felons of themselves, and others are under a degree of partial insanity, when they commit these offences . . . .

1 Hale, *supra*, at 30. Hale noted the difficulties posed by this question:

> [I]t is very difficult to define the indivisible line that divides perfect and partial insanity, but it must rest upon circumstances duly to be weighed and considered both by the judge and jury, lest on the one side there be a kind of inhumanity towards the defects of human nature, or on the other side too great an indulgence given to great crimes.

Id.

Hale's articulation of where to draw the line between partial insanity – which did not exonerate a defendant from a capital offense – and what Hale called "perfect . . . insanity," "absolute madness," or "total deprivation of memory" – which did – focused on a defendant's ability to "understand[]" his circumstances. *Id.* According to Hale, the "best measure" to distinguish between partial insanity and the "absolute madness" for purposes of avoiding capital punishment is that, "such a person as labouring under melancholy distempers hath yet ordinarily as great *understanding*, as ordinarily a child of fourteen years hath, is such a person as may be guilty of treason or felony." *Id.* (emphasis supplied).[9] *See also* 3 Giles Jacob, *The Law Dictionary: Explaining the Rise, Progress, and Present State, of the English Law* 383 (T.E. Tomlins ed., 1811) (first American edition of Jacob's Law dictionary, a leading

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[9] Some around the time of the framing argued that Hale's "absolute madness" reference imposed what was termed the "wild beast" standard. In the treason trial of James Hadfield (1800), John Mitford, appearing for the Crown, argued that to be acquitted because of insanity, a man "must not know what he is doing any more than an infant, . . . a brute, or a wild beast." *See* Richard Moran, *The Origin of Insanity as a Special Verdict: The Trial for Treason of James Hadfield (1800)*, 19 Law & Soc'y Rev. 487, 500 (1985). Commentators note that the so-called "wild beast" test is sometimes "mistakenly portrayed as requiring an insanity equivalent to a wild, raving beast." *Id.* n.11. "[T]his misunderstanding came about 'through a *misinterpretation* of [Henry de] Bracton's original use of the Latin term 'brutus,' used by him . . . to compare the insane to those who *lack reason*.'" *Id.*; *accord* Walker, *Insanity Defense*, *supra*, at 28. This is consistent with Hale's treatise. After discussing all forms of dementia that excuse guilt for capital crimes to include equating "total alienation of the mind" with having the reasoning ability of less than a fourteen-year-old, Hale concluded that persons suffering from these defects cannot be guilty of capital offenses because "they have not the use of understanding, and act not as reasonable creatures, but their actions are in effect in the condition of brutes." 1 Hale, *supra*, at 30-32. According to Hale's text, therefore, those who had the reasoning ability of that of a child less than fourteen years of age were considered to act as "brutes."

encyclopedia of the eighteenth century, adopting this same understanding of a 14-year-old standard); *accord* 1 Collinson, *supra*, at 475. Coke too adopted the 14-year-old "age of discretion" standard for determining whether a mental illness rendered a defendant a "madman" under the law. 1 Walker, *Crime*, *supra*, at 39.

It follows that the level of understanding required to meet the more forgiving standard of fitness for execution was at least that of a child less than 14 years old. As imprecise as that standard may be, it does not support the Fifth Circuit's approach. A person with the capacity of a child of 13, or even younger would likely have been capable of "awareness" that he or she was to be executed. Nonetheless, that person would not have been competent for execution under Hale's rendition of the common law standard, a rendition available to and studied by the Framers, while that person would be subject to execution under the standard adopted by the court below.

Hale's formulation and other commentaries reflect the most analytical mode of assessing competence. In practice, in London's Old Bailey and other courts, the approach appears, if anything, to have been more indefinite. Courts did not draw the fine lines the Fifth Circuit did, or seek to deconstruct the delusions of mentally ill defendants to determine whether some fragment was tethered to reality. Indeed, some cases suggest that awareness of the prospect of punishment was not an impediment to a finding of insanity.[10] The inquiry at all stages,

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[10] 1 *Select Trials for Murders, Robberies, Rapes, Sodomy, Coining, Frauds, and Other Offences; at the Sessions-House in the Old-Bailey*, 406-09, 407 (1734) (Richard Glyn told the defendant, "you must be hang'd for killing her . . . . Aye, [said the prisoner,] I know that as well as you."); *id.* at 409 ("The Jury acquitted him of the Murder, as being Lunatick at that Time."). In 1784, William Walker was tried for stabbing his wife to death. A constable discovered Walker's wife bleeding and exclaimed: "Walker, what have you done? you have killed your wife." Walker replied: "she deserved it, she used me ill, I am not sorry for it,

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including the determination of fitness for trial or execution, occurred at a higher level of generality, taking into account the general understanding and actions of the defendants.

In the trial of Elizabeth Collins in 1766, for example, the defendant was indicted for stealing. Collins's insanity was gauged not by any rigid test, but by an examination of her incoherent rambling.[11] Likewise in the 1790 trial of John Frith for throwing a stone at George III's coach, the insanity determination apparently was based principally on the defendant's bizarre responses to questioning. 1 Walker, *Crimes*, *supra*, at 223-24.[12]

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now I shall be hanged . . . ." Great Britain, Sessions (City of London and County of Middlesex), *The Whole Proceedings on the King's Commission of the Peace, Oyer and Terminer, and Gaol Delivery for the City of London: And Also The Gaol Delivery for the County of Middlesex; Held at Justice Hall in the Old Bailey* 529-49, 537 (1783). The jury found Walker not guilty after the judge advised them that if the murder resulted from "insanity, you must then find him not guilty." *Id.* at 549.

[11] Collins reportedly stated "I want to go to the Captain . . . my husband is a gentleman; he is settled at Boston in New England. I was taken up and put into prison among all thieves . . . Justice Fielding and Mr. Welch . . . call me a mad woman: I am not mad, only I am kept from my husband . . . . Nobody knows I am here now, my Lord, but myself. I wanted to see you, and they would not let me: I went and broke the high constable's windows . . . . I may as well be dead as alive . . . If they will produce a letter that the captain does not like me, I'll agree to be hanged. He allows me a lady's income." Old Bailey Proceedings Online, Trial of Elizabeth Collins, Theft: Simple Grand Larceny May 14, 1766 (T17660514-21), http://www.oldbaileyonline.org/html_units/1760s/t17660514-21.html (last visited Feb. 21, 2007).

[12] Frith reportedly stated: "When I first arrived at Liverpool I perceived I had some powers like those which St[.] Paul had; and the sun that St[.] Paul gives a description of in the Testament: an extraordinary power that came down upon me – the power of Christ; in

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In 1756, Robert Ogle was tried for murder.[13] The defendant's state of mind at the time of the alleged crime was not at issue. But the jury, apparently without medical or other evidence concerning his competency, concluded that Ogle was "not of sound mind and memory" to stand for trial based on testimony regarding his irrational state of mind. One witness testified, "I do not think he behaved like a rational man; a rational man would have been concerned for this person he had killed; but he seemed to have no concern at all."[14] Post conviction standards, as discussed, appeared equally generalized.[15]

The common law thus did not bequeath definitive standards to determine competence for execution. What can be said is that the Framers looking to the common law would have understood the ban on executing the mentally ill as both longstanding and broad. Their sources would not have sustained a view of the law as requiring the narrow competency test

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consequence of my being persecuted and ill-used the public wanted to receive me as a most extraordinary kind of man . . . . When I went to St Thomas's church I was there surprised the hear the clergyman preach a most extraordinary sermon upon me as if I was a god . . . ." 1 Walker, *Crimes*, *supra*, at 223-24.

[13] Old Bailey Proceedings Online, Trial of Robert Ogle, Killing: Murder, June 3, 1756 (T17560603-29), http://www.oldbaileyonline.org/html_units 1750s/t17560603-29.html (last visited Feb. 21, 2007).

[14] *Id.* (William Cane testimony); *id.* ("Sometimes he has appeared as a madman, and sometimes not quite so bad.") (Arlington testimony); *id.* ("His mind changes several times a day"); *id.* ("I take him to have been a man out of his senses chief part of the time. He has very odd actions."); *id.* ("Not in his senses. I have not thought him so at all, so much as I could wish.") (Nichols testimony).

[15] Although one cannot draw firm conclusions from the *results* of the trials or proceedings as to who would be regarded as insane because juries could have disbelieved evidence of insanity or wrongly adjudged a sane person incompetent, these cases nonetheless shed some light on *how* common law judges and juries assessed the issue.

employed by the Fifth Circuit, requiring only awareness of the impending execution and not the relationship between the crime and the punishment. *Panetti*, 448 F.3d at 819. Moreover, while a Framer drawing on Blackstone, Hale, and framing-era practice might well have found the standards for competence imprecise or even amorphous, the law as generally understood then would not have allowed the execution of a mentally ill and delusional defendant like Mr. Panetti.

III. THE FIFTH CIRCUIT'S HOLDING IS INCONSISTENT WITH THE COMMON LAW RATIONALES FOR NOT EXECUTING THE MENTALLY ILL.

Particularly given the lack of a precise, uniformly accepted definition of fitness for execution, the Court can draw "reasonable inference[s]" about the standard from the purposes of the ban. *Cf. Crawford v. Washington*, 541 U.S. 36, 52 n.3 (2004). The Court, including Justice Powell in his concurring opinion providing a majority, did just that in *Ford*. Justice Powell concluded, based on the justifications for the death penalty, that it cannot be applied to those "who are unaware of the punishment they are about to suffer and why they are to suffer it." 477 U.S. at 422 (Powell, J., concurring). Detailed examination of the rationales for the common law rule confirms that it would not have allowed execution of individuals who satisfied the narrow standard adopted below.

A. Mental Illness Limited the Ability to Defend Against Execution.

A central purpose of the common law ban on executing the mentally ill was to afford the defendant the opportunity to defend his life before the sentence was carried out. *See* Barbara A. Ward, *Competency for Execution: Problems in Law and Psychiatry*, 14 Fla. St. U. L. Rev. 35, 49-50 (1986); Geoffrey C. Hazard, Jr. & David W. Louisell, *Death, the State, and the Insane: Stay of Execution*, 9 UCLA L. Rev. 381, 383 (1962). Both Hale and

Blackstone cited this rationale in their respective treatises.[16] Similarly, others explained that the law forbade such executions because:

> [A] Person of *non sana Memoria*, and a Lunatick during his Lunacy, is . . . disabled to make his just Defence. There may be Circumstances lying in his private Knowledge, which would prove his Innocency, of which he can have no Advantage, because not known to the Persons who shall take upon them his Defence.[17]

The importance of this rationale relates not to whether Mr. Panetti had an opportunity to present defenses under our current legal system. Rather, the question is whether in light of this rationale, the common law would have countenanced the Fifth Circuit's approach. The answer is no. At common law, pardons and commutations of sentences through clemency were a regular part of criminal procedure. *See* Langbein, *supra*, at 60-61, 324-25; Banner, *supra*, at 54. It was typical for prisoners to make pleas for clemency until the hour of execution. Banner, *supra*, at 41. If condemned prisoners were to have any hope of avoiding death, they could not do or say anything that may reflect anything less than good character. *Id.* Hale and Blackstone recognized that persons of non sane memory, like Mr. Panetti, cannot plead effectively for clemency, and thus should not be executed. More specifically, a defendant who believed the "State's real motivation is to punish him for preaching the Gospel," *Panetti*, 448 F.3d at 818, could not properly have made the case for mercy. The Fifth Circuit's distinction thus is not consistent with

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[16] *See* 4 Blackstone, *supra*, at 24-25 ("[I]f, after judgment, he becomes of nonsane memory; execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution"); 1 Hale, *supra*, at 35 ("for were he of sound memory, he might allege somewhat in stay of judgment or execution").

[17] Hawles, *supra*, at 205.

this rationale for the common law rule, and the rule would not have permitted execution under the circumstances here.

B. Execution of the Insane Did Not Satisfy Society's Retributive Interests.

The common law saw retribution as a central purpose of capital punishment. Banner, *supra*, at 23; Ward, *supra*, at 54-56; Hazard & Louisell, *supra*, at 386-87. This purpose required that a morally guilty offender suffer punishment of equal quality to the wrong he committed. *See* Banner, *supra*, at 14; Ward, *supra*, at 54; Hazard & Louisell, *supra*, at 386-87. The common law rule reflected an understanding that executing a mentally ill person exacted a punishment of lesser value than executing a sane person. *See* Ward, *supra*, at 54; Hazard & Louisell, *supra*, at 387. In balancing punishment and crime, the measured quality of the punishment included the criminal's suffering in anticipation of death. *See* Ward, *supra*, at 54; Hazard & Louisell, *supra*, at 387. Coke and others who helped shape the English common law shared this view. *See* 1 Walker, *Crimes*, *supra*, at 197. If the condemned criminal could not understand and appreciate why he was being executed, he could not satisfy the social impetus for punishment equal to the crime.

In addition, the theory of retribution at common law went beyond merely punishing the individual criminal, but also involved teaching a moral lesson to the community as a whole. Because the cause of crime in the eighteenth century was thought to be the failure to control a natural human tendency toward evil, "failure to punish the crime would spread the criminal's guilt to the entire community." Banner, *supra*, at 23. Executions, therefore, were public spectacles, complete with sermons and frequently lengthy confessions by the condemned criminals. *Id.* at 13-16, 31-32. It was crucial to this aspect of retribution that the community identify with the criminal. Banner, *supra*, at 32; *see also* Hazard & Louisell, *supra*, at 387. Given the mores of the time, the community could not identify with a mentally ill, delusional criminal sufficiently to satisfy this

purpose. *See* Walker, *Crimes*, *supra*, at 197; *see also* Hazard & Louisell, *supra*, at 387; Banner, *supra*, at 32. John Locke, who cited Hale and Hawkins when explaining why *non compos* defendants were not executed for capital crimes, elaborated on this point:

> Rewards and punishments are evidently instituted for the benefit of society, for the encouragement of virtue, or suppression of vice, in the object thus rewarded or punished, and in the rest of the community; but what tendency to the above purposes can either of these have, if dispensed to one who is not so far himself as to become conscious of having done anything to deserve it? What instruction is conveyed to him? What admonition to such others, as are duly acquainted with the whole of the case, and see every circumstance thus grossly misapplied?[18]

The Fifth Circuit's "awareness" standard is not consistent with this rationale. As Justice Powell concluded in *Ford*, "one of the death penalty's critical justifications, its retributive force, depends on the defendant's awareness of the penalty's existence and purpose." 477 U.S. at 421 (Powell, J., concurring). The Fifth Circuit dispenses with half of the required understanding.

C. Executing the Mentally Ill Did Not Serve the Deterrent Function of Capital Punishment.

Deterrence was a key rationale for the death penalty at common law, *see* Banner, *supra*, at 23, and it had much in common with the retributive rationale. However, while retribution was retrospective, focused on punishment of the offender, deterrence was prospective, focused on preventing future crimes. As with retribution, however, it was widely accepted at common law that the public must identify with the

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[18] 2 John Locke, *An Essay Concerning Human Understanding* 304, 306-07 (19th ed. 1793).

condemned prisoner for his execution to have a deterrent effect on others. *See* Walker, *Crime*, *supra*, at 197; Hazard & Louisell, *supra*, at 384 & n.13 (noting that "Coke has it that taking the human life of an insane person does not serve as an example to others"). Common law scholars believed that these punishments would not deter criminal behavior. William Nelson explained that "while [a defendant] is Lunatick, he is *Demens*, and 'tis his Madness and not his Intention, which is the Cause of the Action; and for that Reason his Punishment could not be an Example to others." 2 William Nelson, *An Abridgment of the Common Law: Being a Collection of the Principal Cases Argued and Adjudged In the Several Courts of Westminster Hall* 1141 (1726). Giles Jacob wrote that "the Punishment of a Lunatick without his Mind and Discretion, [cannot] be an Example to others." Giles Jacob, *A Law Grammar; or Rudiments of the Law* 88 (4th ed. 1767).

Although Hawles noted that, with capital punishment, the "Terror for the Living is equal, whether the Person be mad or in his Senses," Hawles, *supra*, at 205, he argued that if "the King is . . . no otherwise benefited by the Destruction of his Subjects, than that the Example deters others from committing the like Crimes; and there being so many to be made examples of, besides those on whom the Misfortunes of Madness fall, it is inconsistent with Humanity to make Examples of them." *Id.* at 206. Indeed, this reasoning from the common law era suggests that executing the mentally ill could generate more pity for the criminal than fear of punishment among the general public, thus weakening the deterrent effect of the death penalty. Hazard & Louisell, *supra*, at 384-85. This would be true even if the defendant was "aware" that he was to be executed, so long as his mental illness was sufficiently pronounced to set him apart from the populace. Thus, the deterrence rationale for the ban on execution of the mentally ill also indicates that the common law would not have drawn a distinction resulting in execution of someone who did not understand why he was being punished.

D. Execution of the Mentally Ill Deprived the Condemned Criminal of the Opportunity to Make Peace with God.

In the seventeenth and eighteenth centuries, capital punishment was understood to facilitate a criminal's repentance. Banner, *supra*, at 16. Because repentance before death was generally thought indispensable to salvation, *id.* at 23, common law practitioners considered it "inconsistent with Religion, as being against Christian Charity to send a great Offender quick, as it is stil'd, into another World, when he is not of a capacity to fit himself for it." Hawles, *supra*, at 206. As noted, at the time of the framing, there was frequently a short period – generally no longer than two weeks – between conviction and execution, to allow the prisoner to prepare for death and, in particular, to repent. Banner, *supra*, at 17. Ministers, among others, regularly visited condemned prisoners. *Id.* at 18-19. True repentance, however, required a criminal to acknowledge his crimes. *Id.* at 20.

The repentance envisioned by the common law would have been impossible for a person such as Mr. Panetti, whose mental illness causes delusions that he is being "persecuted for his religious activities and beliefs," *Panetti*, 448 F.3d at 817 (citation omitted), rather than being punished for his wrongdoing. Given this rationale, it would have been regarded at common law as inhumane to execute such a defendant.

CONCLUSION

The common law ban on execution of the mentally ill, which sets the floor for Eighth Amendment protections, would not have embraced the approach of the Court below or permitted execution of Mr. Panetti. The judgment therefore should be reversed.

Respectfully submitted,

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